SENATE MODERNIZATION: MOVING FORWARD

APRIL 2018

Interim Report of the Special Senate Committee on Senate Modernization – Part II

The Honourable Stephen Greene, Chair
The Honourable Serge Joyal, P.C., Deputy Chair
The Honourable Thomas Johnson McInnis, Deputy Chair

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MEMBERS OF THE COMMITTEE

The Honourable Stephen Greene, *Chair*
The Honourable Serge Joyal, P.C., *Deputy Chair*
The Honourable Thomas Johnson McInnis, *Deputy Chair*

The Honourable Senators:

Tony Dean
Art Eggleton, P.C.
Linda Frum
Frances Lankin, P.C.
Ghislain Maltais
Paul J. Massicotte
Elaine McCoy
Percy Mockler
Carolyn Stewart Olsen
Josée Verner, P.C.
David M. Wells

Ex officio members of the Committee:

The Honourable Peter Harder, P.C. (or Diane Bellemare), (or Grant Mitchell)
The Honourable Larry W. Smith (or Yonah Martin)
The Honourable Joseph A. Day (or Terry M. Mercer)
The Honourable Yuen Pau Woo (or Raymonde Saint-Germain)

Other senators who have participated from time to time in this study:

The Honourable Senators Beyak, Black, Bovey, Carignan, P.C., Cools, Cormier, Cowan, Dagenais, Day, Deacon, Duffy, Dupuis, Forest, Fraser, Gagné, Gold, Greene, Johnson, MacDonald, Marshall, Marwah, McIntyre, Mercer, Mitchell, Neufeld, Ngo, Oh, Omidvar, Plett, Poirier, Pratte, Ringuette, Seidman, Sinclair, Tannas, Tardif and Tkachuk.

Staff Members:

Marc-André Roy and David Groves, Analysts from the Parliamentary Information and Research Service of the Library of Parliament
Blair Armitage, Committee Clerk

ORDER OF REFERENCE

Extract from the *Journals of the Senate*, Friday, December 11, 2015:

The Senate resumed debate on the motion of the Honourable Senator Cowan, seconded by the Honourable Senator Fraser:

That a Special Committee on Senate Modernization be appointed to consider methods to make the Senate more effective within the current constitutional framework;

That the committee be composed of fifteen members, to be nominated by the Committee of Selection, and that five members constitute a quorum;

That the committee have the power to send for persons, papers and records; to examine witnesses; and to publish such papers and evidence from day to day as may be ordered by the committee;

That the committee be authorized to hire outside experts;

That, notwithstanding rule 12-18(2)(b)(i), the committee have the power to sit from Monday to Friday, even though the Senate may then be adjourned for a period exceeding one week; and

That the committee be empowered to report from time to time and to submit its final report no later than June 1, 2016.

After debate,

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

Extract from the *Journals of the Senate*, Tuesday, May 17, 2016:

The Honourable Senator McInnis moved, seconded by the Honourable Senator Andreychuk:

That, notwithstanding the order of the Senate adopted on Friday, December 11, 2015, the date for the final report of the Special Senate Committee on Senate Modernization in relation to its study of methods to make the Senate more effective within the current constitutional framework be extended from June 1, 2016 to December 15, 2016.

After debate,

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

Extract from the *Journals of the Senate*, Monday, December 12, 2016:

The Honourable Senator McInnis moved, seconded by the Honourable Senator Marshall:

That, notwithstanding the order of the Senate adopted on Tuesday, May 17, 2016, the date for the final report of the Special Senate Committee on Modernization in relation to its study of methods to make the Senate more effective within the current constitutional framework be extended from December 15, 2016 to June 30, 2017.

After debate,

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

Extract from the *Journals of the Senate*, Monday, June 19, 2017:

The Honourable Senator McInnis moved, seconded by the Honourable Senator McIntyre:

That, notwithstanding the order of the Senate adopted on Monday, December 12, 2016, the date for the final report of the Special Senate Committee on Senate Modernization in relation to its study of methods to make the Senate more effective within the current constitutional framework be extended from June 30, 2017 to December 15, 2017.

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

Extract from the *Journals of the Senate*, Tuesday, November 28, 2017:

The Honourable Senator Greene moved, seconded by the Honourable Senator Verner, P.C.:

That, notwithstanding the order of the Senate adopted on Monday, June 19, 2017, the date for the final report of the Special Senate Committee on Senate Modernization in relation to its study of methods to make the Senate more effective within the current constitutional framework be extended from December 15, 2017 to June 29, 2018.

The question being put on the motion, it was adopted.

Nicole Proulx
Clerk of the Senate

I. INTRODUCTION

The Special Senate Committee on Senate Modernization (the Committee) is pleased to table Part II of its ongoing study of the rules, procedures and practices that guide how the Senate conducts parliamentary business and how senators perform their parliamentary functions.

In October 2016, this committee tabled Part I of its study. That report, *Senate Modernization: Moving Forward (Part I)*, which focused on the equality of senators and the need to accommodate a growing number of independents, proposed 21 recommendations, ranging from developing a process to elect the Speaker, to broadcasting Senate proceedings, to allowing for the recognition of non-partisan caucuses in the *Rules of the Senate*.

While it was drafting and completing its first report, the Committee began to consider what further work would be necessary and what significant issues had arisen from its study so far. From these considerations, a key question emerged: what, if any, are the contours and requirements of the "Westminster system"?

Underlying this question was a concern, expressed in commentary and elsewhere, that the Senate's ongoing modernization might imperil Canada's commitment to the Westminster system of government – a term generally understood to refer to the parliamentary model developed in the United Kingdom and adopted by many of its former colonies, including Canada.

As noted in Part I of its study, the Committee has been guided, throughout its work, by two objectives. The first is to adhere to a set of animating principles that reflect a common understanding of the purposes of the Senate and its place in the Canadian parliamentary system. Those principles are: sober second thought; bicameralism; independence; democracy; preservation of the rights and privileges of Parliament and parliamentarians; equality; regional representation; and minority representation.

The second objective is a clear recognition of the mandate that the Committee has received, which is to consider "methods to make the Senate more effective within the current constitutional framework". As noted in the Part I of this study:

> [t]he kind of reform contemplated in the order of reference constituting this committee has been characterized as "modernization." This was a conscious choice of phrasing and it is significant in a number of respects. Firstly, the term acknowledges the reality that fundamental constitutional reforms will be difficult to achieve without some provincial

> involvement. Secondly, it reflects a strong desire on the part of the Canadian public as well as senators themselves to move forward quickly to initiate changes that are within the Senate's power to implement. Thirdly, the term implies a recognition that traditional notions of how the Senate operates in discharging its parliamentary functions are being challenged and may no longer be suitable to meet the needs of a modern Senate.[1]

In other words, a central tenet of this Committee's work has been that the modernization process is not intended to challenge the constitutional foundations of the Canadian Senate. Holding to this commitment, it became clear that a more detailed understanding of those constitutional foundations would be essential to the success of the modernization project. How should Canadians interpret the statement, as outlined in the preamble to the *Constitution Act, 1867*, that the Parliament of Canada be "similar in principle" to that of the United Kingdom? In particular, what are the fundamental characteristics of the Westminster system and what limits, if any, do they place on the process of modernizing the Senate's procedures and operations?

II. WHAT IS THE WESTMINSTER SYSTEM?

In seeking to answer these questions, among others, the Committee invited several witnesses to provide evidence, including current and former senators, academics and experts from Canada and abroad, and foreign parliamentarians. Those witnesses shared a variety of different perspectives.

Senator Joseph Day, for example, stated that "the fundamental Westminster model" needs a government group of some kind that puts forward government legislation and argues in support of it, along with an opposition to test that legislation.[2] As a result, he asserted, any reforms to Senate procedure or practice that remove the presence of government and opposition (though not necessarily an "official" opposition) would violate the basic tenets of the Canadian parliamentary system.

Senator Claude Carignan echoed this position, adding that the Fathers of Confederation "deliberately chose to structure the Senate on [the Westminster] model, with a government side and an opposition side."[3]

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[1] *Ibid.*, p. 1.
[2] Proceedings of the Special Committee on Senate Modernization, Issue 8, *Evidence*, 30 November 2016.
[3] Proceedings of the Special Committee on Senate Modernization, Issue 6, *Evidence*, 19 October 2016.

Similarly, Gary Levy submitted that the most distinctive feature of the Westminster system is the concept of Her Majesty's Loyal Opposition, and stressed that "Parliament is, above all, a vehicle for opposition."[4] As such, he contended that even if the logic of the opposition applies more clearly in an elected lower house, a completely non-partisan upper house would still not be in keeping with the Westminster system.[5]

By contrast, Senator Elaine McCoy observed that the Westminster model is extremely flexible and variable and that the Senate itself is a unique chamber among Westminster parliaments. As a result, in her view, looking to the "Westminster system" for prescriptive guidance or for restrictions on the Senate modernization process is of limited utility.[6]

Thomas Hall, former procedural clerk in the House of Commons, testified that the Westminster system is "located in the House of Commons" as "the locus of responsible government and ... the house of confidence" and that there is no requirement that the Westminster system include a second chamber at all.[7] In his opinion, the only condition for upper chambers in Westminster systems is that they be "politically subordinate" to the lower house – otherwise, responsible government, in which the government is accountable to the House of Commons, could not function.[8]

Professor Philippe Lagassé, an expert in parliamentary democracy, offered a complementary perspective, noting that there are many different models of the Westminster system in the world and that it would be more appropriate and useful to speak of "Canada's style of Westminster than Westminster in general".[9] He also suggested that Westminster is not a fixed, immutable system so much as a set of principles. In his mind, for example, "structured or institutionalized opposition" is a positive feature of the Westminster system but not an "undeniable constraint" on reforming the role of political parties, the government, and the opposition in the Senate since it is not a confidence chamber.[10] To Professor Lagassé, the question is not whether the Westminster model permits a given reform, but whether the reform itself is desirable: "You have the liberty to move away from that if you so choose and still

[4] Proceedings of the Special Committee on Senate Modernization, Issue 10, *Evidence*, 1 March 2017.
[5] *Ibid.*
[6] Proceedings of the Special Committee on Senate Modernization, Issue 7, *Evidence*, 16 November 2017.
[7] Proceedings of the Special Committee on Senate Modernization, Issue 10, *Evidence*, 1 March 2017.
[8] *Ibid.*
[9] Proceedings of the Special Committee on Senate Modernization, Issue 8, *Evidence*, 14 December 2016.
[10] *Ibid.*

call it Westminster. The question is: Do you still feel that model is essential to your work? Does it enable your work?"[11]

A recent academic study of Westminster governments supports Professor Lagassé's assessment. In *Comparing Westminster*, Professors R.A.W. Rhodes, John Wanna and Patrick Weller examine some of the historical scholarly attempts to define the Westminster system of government. To begin, they note that the term "Westminster" is used to distinguish a "British-inspired version of parliamentarianism from other legislative and presidential systems."[12] However, they also observe:

> There is debate and contestability over what constitutes "Westminster" and whether there exists a core of essential practices. Some constitutionalists and practitioners see Westminster as a set of relationships between the executive government and parliament: where principal members of executive government should be drawn from the members of the parliament. The key feature here is that the parliament determines *who* is the government and *for how long* they are in government, and parliament limits a great deal of what the executive can do. Others will often use the term "Westminster model" normatively and nostalgically to define the way they think government ought to work. ... While idealized notions of Westminster exist, such idealized models are of limited analytical value.[13]

What the authors ultimately suggest is that Westminster merely *describes* how government might be conceived and organized as it provides "a set of beliefs and shared inheritances that create expectations, and hands down practices that guide and justify behaviour."[14] As these assumptions, expectations, and practices have interacted with local traditions in former British colonies, they have been reshaped and repurposed to suit the particular needs of those polities.[15]

The authors argue that the Westminster model describes a system of government with four discernable traditions:

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[11] *Ibid.*
[12] R.A.W. Rhodes, J. Wanna and P. Weller, *Comparing Westminster*, Oxford University Press, 2011, p. 1.
[13] *Ibid.*, p. 3.
[14] *Ibid.*
[15] *Ibid.*, p. 219.

- the Royal Prerogative (which this Committee understands to include a reference to the presence of the Crown in Parliament, and its role in maintaining the continuity of the parliamentary system);
- responsible government;
- constitutional bureaucracy (which is the term the authors use to refer to the existence of a neutral, permanent civil service); and
- representative government.[16]

As it applies to the legislative branch, the authors identify a number of important elements that distinguish the Westminster system from other models of government:

- parliamentary sovereignty;
- a role in sustaining the executive (confidence and legitimacy, support for law-making, scrutiny, and conflict resolution);
- the presence of second chambers, or upper houses, that are not confidence chambers but that play multiple roles, including allowing for a diversity of representation, ensuring more robust deliberation, and providing scrutiny and oversight of the executive;
- the presence of a government-in-waiting, should the incumbent lose favour or confidence, which the authors call the "loyal opposition" (or "official opposition"); and
- a role as a representative body from which the executive is composed and as a forum for the expression of party interests.[17]

Overall, the evidence received by the Committee supports this thesis: the Westminster system is less a fixed and limiting prescription than a set of principles capable of alteration to suit the particular realities of the nation or community in which it is applied. For example, Professor David Docherty pointed to the legislatures of Nunavut and the Northwest Territories, which both employ a non-partisan consensus government model, to stress the considerable variability that the system can tolerate:

> I think what's important to keep in mind is that I think we failed to recognize just how flexible and adaptable the Westminster parliamentary system is. They are much smaller, but we have two Westminster governments in Canada in two of the territories, and they don't have parties. They're elected as

[16] *Ibid.*, p. 17.
[17] *Ibid.* See Chapter 7, "Parliaments and Representation."

> independents and they vote for who's going to be in cabinet, and that seems to work out fine.[18]

To paraphrase Professor Lagassé, then, it is more useful, when considering Canada's constitutional commitments, to refer to Westminster *principles* in the Canadian context rather than a single, fixed Westminster *system* that applies consistently around the world.[19] In other words, the question for the Senate modernization project might be: what are the contours and requirements of "Canadian-style" Westminster?

III. "CANADIAN-STYLE" WESTMINSTER

In keeping with the evidence the committee collected on Westminster – specifically on its flexibility and adaptability – the history of the Westminster system in Canada offers a vivid example of its capacity to adapt to local conditions and requirements, in this case a federation of provinces each possessing distinctive characteristics.

Although the *Constitution Act, 1867* states that Canada's Constitution is to be "similar in principle to that of the United Kingdom," the constitutional structure it set out was already quite different from the Westminster template. This structure responded to the new country's distinctive circumstances. As noted by the Supreme Court of Canada in its discussion of the Senate specifically, "[t]he upper legislative chamber, which the framers named the Senate, was modeled on the British House of Lords, *but adapted to Canadian realities*."[20] The same could be said of the Constitution more generally: modeled on, but not copied from, the United Kingdom, to suit Canadian needs. Some major examples of this adaptation are as follows:

- Unlike the United Kingdom, which was a centralized, unitary state, Canada was constituted as a federation of (then) four provinces, each of which had its own provincial legislature. The *Constitution Act, 1867* also divided legislative powers between the Parliament of Canada and the provinces. As explained by the Supreme Court of Canada in the *Reference re Secession of Quebec*, this was done to recognize, and protect, regional difference: "the principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of

[18] Proceedings of the Special Committee on Senate Modernization, Issue 7, *Evidence*, 23 November 2016.
[19] Proceedings of the Special Committee on Senate Modernization, Issue 8, *Evidence*, 14 December 2016.
[20] *Reference re Senate Reform*, [2014] 1 SCR 704, 2014 SCC 32, para. 15 [references omitted, emphasis added].

provincial government to develop their societies within their respective spheres of jurisdiction."[21]

- Canada's federal nature was also reflected in the distinct way that its people are represented in Parliament. While the House of Commons – the popular chamber – was designed to implement the principle of proportional representation (or "representation by population") the Senate embodies federalism by providing for representation of regional/provincial interests independent from their demographic weight. This feature of Canadian-style Westminster, born from the negotiations that led to Confederation, was a necessary compromise in order to secure the agreement of the three colonies that would initially form Canada.[22]

- The United Kingdom's system of government operates based on unwritten rules and statute law that have evolved over centuries. By contrast, Canada's adaptation of the Westminster principles rests on a written Constitution, which "promotes legal certainty and predictability, and [which] provides a foundation and a touchstone for the exercise of constitutional judicial review."[23] As such, while the British Parliament is supreme, Canada's Parliament has always been subordinate to the written Constitution, which since 1982 has also included the *Canadian Charter of Rights and Freedoms* (the Charter).

- As observed by the Supreme Court of Canada, the Canadian Senate, although in some respects modelled on the 19th century British House of Lords, is quite different from the United Kingdom's upper chamber. Like the British House of Lords in 1867, the Senate was initially – and for most of its history – populated almost exclusively by individuals affiliated with political parties. However, as Canada never possessed a landed aristocracy, the Senate was not composed of hereditary peers, but was rather made up of individuals appointed for life who met certain property qualifications. Furthermore, senators are appointed to represent a particular region (and in the Province of Québec, a particular senatorial division).[24] And in a final example, while the legislative powers of the Senate are similar to those possessed by the House of Lords at the time of Confederation, the House of Lords has, since then, lost its absolute veto on bills. In considering these differences, Professor David Smith went so far as to state that "[t]he Senate is original and unlike the House of Lords" and that, as a result, "it is misleading to say that the Constitution is similar in

[21] *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 58.
[22] Janet Ajzenstat, "Bicameralism and Canada's Founders: The Origins of the Canadian Senate" in The Hon. Serge Joyal, ed., *Protecting Canadian Democracy: the Senate You Never Knew*, McGill-Queen's University Press, 2001, pp. 14-6.
[23] *Ibid.*, para. 53.
[24] For more information, see generally Ajzenstat, *supra* note 22, pp. 3-30.

> principle to that of the United Kingdom, which is what the first line of the preamble of the Constitution does say."[25]

In addition to these differences, which have existed since Confederation, Canada's parliamentary system has evolved since 1867, alongside Canadian society. The right to vote, for example, was gradually expanded so that today every Canadian citizen is entitled to participate in federal, provincial and territorial elections. Furthermore, in 1929, the Judicial Committee of the Privy Council recognized, in *Edwards v. Canada (Attorney General)*, that women are "qualified persons" for the purpose of s. 24 of the *Constitution Act, 1867*, and are therefore eligible for appointment to the Senate.[26] The most important change occurred in 1982 with the adoption of the Charter, which transformed our system of government "from a system of Parliamentary supremacy to one of constitutional supremacy."[27] Meanwhile, as addressed below, the United Kingdom's parliamentary system – the beacon of the Westminster model – also evolved considerably, and so did other Westminster parliaments.

Since Confederation, the Senate as an institution has also proven its capacity to adapt to new realities. Although the written constitutional framework under which the Senate operates has only seen minor changes in the last 150 years – specifically, the imposition of mandatory retirement for senators at age 75 and the addition of seats for new provinces and territories – it has nonetheless evolved significantly in order to keep up with broader constitutional and societal changes.

One important example of such evolution is the Senate's composition, which, driven by changes in the factors that prime ministers have weighed in appointing senators, has developed considerably over time to better reflect Canadian society and to compensate for gaps in representation in Parliament. Significant milestones with respect to improvement in the Senate's representativeness include the appointments of the first woman to the Senate in 1930 and of the first Aboriginal senator in 1958. As noted by the Supreme Court of Canada in the *Reference re Senate Reform*:

> Over time, the Senate [...] came to represent various groups that were under-represented in the House of Commons. It served as a forum for ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful

[25] Proceedings of the Special Committee on Senate Modernization, Issue 1, *Evidence*, 9 March 2016.
[26] *Edwards v. Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC). The Judicial Committee of the Privy Council was, until 1949, the highest court of appeal of civil jurisdiction in Canada.
[27] *Reference re Secession of Quebec*, *supra* note 21, para. 72.

> opportunity to present their views through the popular democratic process.[28]

In addition, over the years, the Senate has refined its role as a chamber of sober second thought that complements the elected House of Commons. The Senate is considered to be "making a largely nonpartisan and highly constructive contribution to the legislative process"[29] by proposing amendments to legislation. Today, the Senate generally understands its legislative role to be that of a revising chamber. It will propose amendments in order to improve legislation, to correct inconsistencies or potential errors, and to bring a bill in line with the Charter and the Constitution.

The Senate has also developed a role in scrutinizing the government. As a chamber of Parliament with only minor constitutional limits on its legislative powers, the Senate is able to serve as a check on the government, even in the absence of a confidence function. It has acknowledged its status as a complementary body to the democratically elected House of Commons and has leveraged its investigative role to effectively scrutinize the executive's legislation and decisions. For instance, the Senate has published multiple policy studies on a myriad of issues concerning Canadians requesting governments to provide answers to its recommendations, over and above its engagement to providing answers to public consultations launched by governments on specific topics. In the words of then-Senator Lowell Murray, the Senate "provides some check on the power of the Cabinet and its Commons majority without challenging or offending today's democratic culture".[30]

Another important aspect of the Senate's place in Canadian democracy that emerged after its creation is its investigative role, which is mainly driven by its standing and special committees. Beginning in the 1960s, the Senate established a reputation for its committee investigations, which "focused on subjects not being addressed by the House of Commons, enabling senators to raise issues that would not otherwise be considered by Parliament."[31] To this day, Senate committees continue to produce high quality, respected reports on a broad range of topics.

Canada's parliamentary system has always been quite distinct from its Westminster counterparts and has continued to evolve in unique ways. Indeed, nothing in the

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[28] *Reference re Senate Reform*, *supra* note 20, para. 16.
[29] C.E.S. Franks, "The Canadian Senate in Modern Times" in The Hon. Serge Joyal, ed., *Protecting Canadian Democracy: the Senate You Never Knew*, McGill-Queen's University Press, 2001, p. 177.
[30] Lowell Murray, "Which Criticisms are Founded?" in The Hon. Serge Joyal, ed., *Protecting Canadian Democracy: the Senate You Never Knew*, McGill-Queen's University Press, 2001, p. 137.
[31] Franks, *supra* note 29, p. 154.

evolution of Canada's federal institutions has affected the existence of the Royal Prerogative, the functioning of responsible government, the neutral bureaucracy or the existence of representative government, and the presence of a recognized opposition.

Furthermore, with respect to the legislative branch, the Committee believes that the following key Westminster principles remain strong and central to its functioning:

- Parliament continues to hold the executive branch to account, to determine its composition, and to provide a forum for opposition;
- the government requires the confidence of the House of Commons; and
- the Senate – as the second chamber in a Westminster-style parliament – remains a complementary body which is an integral part in Canada's system of government.

IV. WESTMINSTER GOVERNMENTS AROUND THE WORLD

In considering the question of the Westminster tradition, the committee was interested in its application in other countries around the world. As a result, the Committee received testimony on the Parliament of the United Kingdom as well as the Scottish Parliament. Furthermore, the Committee also considered the application of the Westminster principles in Australia and New Zealand.

A. The United Kingdom

Perhaps no better place to look when considering the flexibility and adaptability of the Westminster principles is to Westminster itself, which, as the preamble of the *Constitution Act, 1867* describes, served as the inspiration for the development of the Canadian Parliament.

The Parliament of the United Kingdom first developed into a bicameral institution in England in the 13th and 14th centuries, and the House of Lords has existed ever since (with the exception of a brief period following the English Civil War).[32] According to Professor Meg Russell, it is "product of evolution rather than design,"[33] with its role, powers, and compositions changing gradually over time and without the direction of a written constitution. She sees this, paradoxically, as a source of durability:

[32] Meg Russell, *The Contemporary House of Lords*, Oxford University Press, 2013, pp. 15-8.
[33] Meg Russell, "The British House of Lords: A Tale of Adaptation and Resilience" in Jörg Luther, Paolo Passaglia, and Rolando Tarchi, eds., *A World of Second Chambers*, Giuffrè Editore, 2006, p. 71.

> Its ability to adapt has made it remarkably resilient. It has survived each stage of its development sufficiently intact that it continues to appear 'unreformed'. Yet it is also very significantly changed.[34]

Members of the House of Lords are unelected and hold their position for life. Some are "hereditary peers", whose title of nobility passes to and from them through inheritance; others are bishops; but the vast majority are "life peers", appointed by the Sovereign on the advice of the prime minister. Life peers are a relatively new presence in the Lords – first introduced upon the passage of the *Life Peerages Act 1958* – but have become a dominant presence since the elimination of most hereditary positions by the *House of Lords Act 1999*. Unlike appointments to the Canadian Senate, there are no regional or property requirements that apply to this process.[35]

Most of the Lords sit as members of one of the three parties, though a significant portion of them sit as "crossbenchers" – members of the chamber who lack a partisan alignment.[36] As of January 2018, of the 795 peers in the House of Lords, 183, or 23%, were crossbenchers.[37] According to a 2000 UK Royal Commission report on the reform of the House of Lords, the chamber could not function effectively without the involvement of political parties, but that it "is nevertheless crucial that no one political party should be able to dominate the second chamber."[38] With respect to the appointment process, it is worth noting that the prime minister does recommend the appointment of peers who will sit on the opposition benches (following recommendations from the leaders of opposition parties in the House of Commons)[39], as well as crossbenchers (following recommendations from the House of Lords Appointments Commission)[40].

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[34] *Ibid.*, p. 65.
[35] House of Lords Appointments Commission, *Criteria Guiding the Assessment of Nominations for Non-Party Political Life Peers*.
[36] Russell, *The Contemporary House of Lords*, *supra* note 32, p. 101.
[37] Parliament of the United Kingdom, *Lords by party, type of peerage and gender*.
[38] Royal Commission on the reform of the House of Lords, *A House for the Future: Royal Commission on the reform of the House of Lords*, 2000, p. 102.
[39] Members of the House of Lords are appointed by the Queen on the advice of the prime ministers. Since 1997, however, when appointing a peer to represent a political party in the House of Lords, the Prime Minister defers to that party to name an individual. See Meg Russell, "The British House of Lords: A Tale of Adaptation and Resilience" in Jörg Luther, Paolo Passaglia, and Rolando Tarchi, eds., *A World of Second Chambers*, Giuffrè Editore, 2006, p. 74.
[40] The House of Lords Appointment Commission was created in 2000 and is responsible for recommending crossbencher appointments as well as for vetting all life peers nominated by political parties. See House of Lords Appointments Commission, *About Us*.

As with its membership and the process by which they are selected, the formal powers of the House of Lords have evolved significantly in the last century. The *Parliament Acts* of 1911 and 1949, for example, replaced the absolute veto that the Lords once possessed over legislation with the ability only to delay, and a number of unwritten conventions have developed that emphasize restraint and deference by the chamber with respect to legislation that has passed in the House of Commons.[41] As a result, in the words of Lord Norton of Louth, "[i]n practice, the Lords will not normally vote on second reading of a government bill that is its program for the session." [42] He added further that "[i]f the Commons is agreed on ends, [the Lords] will focus on the means."[43]

B. Australia

Another analogue to consider is Australia, which, like the United Kingdom, demonstrates the flexibility and adaptability of the Westminster principles, but unlike the United Kingdom, does so in the context of a federal state and a written constitution.

The Australian Senate has existed since Federation in 1901. Its composition and powers are outlined in the *Commonwealth of Australia Constitution Act 1900*, and while "the constitutional provisions relating to the Senate have undergone no significant change since Federation in 1901, the status and operation of the chamber have changed greatly" since then.[44]

Australian senators are directly elected for six-year terms, in contrast to the maximum three-year terms that members of the Australian House of Representatives may serve. Each state in Australia elects 12 senators under a system of proportional representation; territories elect two.[45] In looking at the changing role and composition of the Senate over the 20th century, the adoption in 1949 of a proportional system for electing senators was a "watershed" moment. This shift gradually led to a difference between the composition of the Senate and that of the House of Representatives. As a result, the Senate has "become much more active in reviewing legislation and scrutinising the executive".[46]

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[41] Russell, *The Contemporary House of Lords*, supra note 32, pp. 83-4.
[42] Proceedings of the Special Committee on Senate Modernization, Issue 8, *Evidence*, 5 April 2017.
[43] *Ibid.*
[44] Bruce Stone, "The Australian Senate: Strong Bicameralism Resurgent" in Jörg Luther, Paolo Passaglia, and Rolando Tarchi, eds., *A World of Second Chambers*, Giuffrè Editore, 2006, pp. 534-6.
[45] Rosemary Laing, ed., *Odgers' Australian Senate Practice (as revised by Harry Evans)*, 14th ed., Department of the Senate, 2016, p. 32.
[46] Stone, *supra* note 44, p. 537.

The Australian Senate is significantly more powerful than the House of Lords. While there are some restrictions in the Australian Constitution on the authority of the Senate, they are both "formally, and in practice, very small," and the Senate's consent is required for the passage of all legislation.[47] This was a deliberate choice, as the designers of the Australian Constitution sought a strong second chamber that could offer representation on a state or territory basis and that more closely mirrored the Senate of the United States than the British House of Lords, even as they retained the British system of cabinet or responsible government.[48]

C. New Zealand and Scotland

Not only is there a great deal of diversity between second chambers in Westminster parliaments, as evidenced by the Australian Senate and United Kingdom's House of the Lords, there are Westminster parliaments that do not even have a second chamber. New Zealand, for example, abolished its upper chamber, known as the Legislative Council, in 1950, and has operated a unicameral parliament ever since.[49]

Similarly, the Scottish Parliament is unicameral. The Committee had the privilege of hearing from its Presiding Officer, The Right Honourable Ken Macintosh, M.S.P., along with its Clerk and Chief Executive, Sir Paul Grice, on the Scottish Westminster experience.

Prior to 1707, Scotland had its own Parliament, separate from that of England. With the Acts of Union, however, these two bodies were replaced by the Parliament of Great Britain, and it was not until 1999, following a successful referendum on devolution, that the Scottish Parliament was re-established.[50] The modern, unicameral Scottish Parliament has legislative jurisdiction over "devolved" matters – subjects that the United Kingdom has ceded to it under the *Scotland Act 1998* and the *Scotland Act 2012*. Under the *Scotland Act 2016*, the United Kingdom is in the process of devolving still further powers.

There are 129 members of the Scottish Parliament (MSPs), belonging to five political parties.[51] The only non-affiliated member is the Presiding Officer. MSPs are elected under a mixed-member proportional electoral system – 73 under a first-past-the-post

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[47] *Ibid.* p. 557. The Senate may not originate tax or appropriations bills and may not amend certain types of tax or appropriations bills, but it may return bills to the House of Representatives and insist that amendments be made (see Laing, *supra* note 45, p. 31)
[48] Laing, *supra* note 45, pp. 2-3.
[49] New Zealand Parliament, *Parliament Brief: What is Parliament?*
[50] The Scottish Parliament, *Staff Handbook – About the Scottish Parliament (Section 1)*.
[51] The Scottish Parliament, *Current MSPs*.

system, and 56 by proportional representation.[52] While there is no official opposition in a formal sense, any party that is not a government party is effectively in opposition.

In speaking to the Committee on the Scottish experience, Presiding Officer Macintosh and Sir Paul made clear that the process of developing a Scottish parliamentary structure involved looking to Westminster but also to different sources for inspiration, and that the goal was always to identify what works best in their unique circumstances.[53] The modern Scottish Parliament, like that of New Zealand, thus reflects a deliberate choice to treat the Westminster system as a set of principles to be adapted and adopted, rather than a fixed prescription.

V. CONCLUSION

In light of the testimony and evidence before the Committee, it considers that the following broad principles are inherent to Westminster systems of government:

- the Royal Prerogative;
- responsible government;
- rules and procedures that protect and facilitate opposition;
- a neutral bureaucracy; and
- representative government.

With respect to the legislative branch specifically, the Committee has also identified four principles that define Westminster parliaments:

- a role in holding the executive branch to account, in determining its composition, and in providing a forum for opposition;
- an executive branch which requires the confidence of the lower chamber to remain in office; and
- when bicameral, a second chamber which is not a confidence chamber, but plays multiple roles, including allowing for a diversity of representation, ensuring more robust deliberation and providing scrutiny of the executive.

However, these lists should not be taken as an exhaustive definition of the Westminster principles, as Westminster does not impose a rigid approach to parliamentary design. Indeed, perhaps the most important feature of the Westminster principles has been and

[52] The Scottish Parliament, *FAQs – MSPs*.
[53] Proceedings of the Special Committee on Senate Modernization, Issue 8, *Evidence*, 17 May 2017.

remains their ability to evolve, or adapt, to the historical, regional, and political realities in which they are situated.

This has certainly been the case with respect to Canada's parliamentary institutions. While the system that has been in place in Canada since 1867 has never been identical to the original Westminster system, the fundamental principles that underpin Westminster remain central to modern Canadian democracy. The same can be said for other Westminster parliaments around the world, from Scotland to Australia to New Zealand, including the Parliament of the United Kingdom itself, which has evolved considerably since it was used as a model for Canada.

The Westminster principles continue to evolve as the countries that have inherited British institutions adapt them to their unique local requirements, and they are especially flexible and adaptable with regards to second chambers, which are tailored to a country's particular circumstances and needs in terms of representation and legislative oversight. In that sense, to the extent that the Senate continues to serve its constitutional role, as a federal chamber, in providing sober second thought for the improvement of legislation, holding the government's agenda to account, and representing minority and regional voices, it will also continue to uphold its commitment to Canadian-style Westminster principles.

With this conclusion, and subject to the Constitution, the Senate is free to approach the modernization project with an open mind and a focus on how, in light of its changing composition, it can best serve the Canadian people – as the site of sober second thought for the improvement of legislation; as a vehicle for scrutiny of the government; as the voice of the regions; as an independent forum for policy inquiry; and as a space for minorities to be heard and for opposition to rally.

APPENDIX A – LIST OF WITNESSES

March 9, 2016	
As an individual	David E. Smith, Distinguished Visiting Scholar, Ryerson University
September 28, 2016	
The Senate of Canada	The Honourable Senator Peter Harder, P.C., Government Representative in the Senate
October 19, 2016	
The Senate of Canada	The Honourable Senator Claude Carignan, P.C., Leader of the Opposition
October 26, 2016	
As an individual	The Honourable Hugh Segal, former senator
November 16, 2016	
The Senate of Canada	The Honourable Senator Elaine McCoy, Facilitator, Independent Senators Group
November 23, 2016	
As individuals	David Docherty, President, Mount Royal University Bruce Hicks, Adjunct Professor, Glendon School of Public and International Affairs, York University
November 30, 2016	
The Senate of Canada	The Honourable Senator Joseph A. Day, Senate Liberal Leader
December 14, 2016	
As individuals	Andrew Heard, Professor, Political Science Department, Simon Fraser University Philippe Lagassé, Associate Professor, School of International Affairs, Carleton University

February 8, 2017	
As an individual	The Honourable Dan Hays, P.C., former Speaker of the Senate
March 1, 2017	
As individuals	B. Thomas Hall Gary Levy, Research Fellow, Carleton University
March 29, 2017	
As an individual	Gary W. O'Brien, Former Clerk of the Senate
April 5, 2017	
House of Lords	The Lord Norton of Louth The Right Honourable The Lord Wakeham DL
As an Individual	Meg Russell, Director, Constitution Unit, Department of Political Science, University College London
May 3, 2017	
As individuals	Adam Dodek, Professor, Faculty of Law, University of Ottawa John Whyte, Senior Policy Fellow, Saskatchewan Institute of Public Policy
May 17, 2017	
The Scottish Parliament	Sir Paul Grice, Clerk and Chief Executive The Right Honourable Ken Macintosh, M.S.P., Presiding Officer